

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-215686

DATE: December 26, 1984

MATTER OF: Richard F. Briggs

DIGEST:

1. Claimant, an investigator for the Air Force, was required to be available by telephone so that he could be called back to his duty station if his services were needed. He is not entitled to premium pay because his residence had not been designated by the agency as his duty station and his duties were not so substantially restricted as to bring him within the purview of 5 U.S.C. § 5545(c)(1) as implemented by 5 C.F.R. § 550.143. Neither would the employee's standby or on-call status be considered hours of work for payment of overtime under 5 U.S.C. § 5542.
2. Claimant, an investigator for the Air Force whose rate of pay was not in excess of maximum rate of grade GS-10, should have received overtime compensation for call-back overtime work instead of compensatory time off if he did not request the compensatory time off. However, payment may not be made in this case because the claimant has not provided evidence sufficient to establish that overtime was worked for which compensatory time had not been requested.

This matter concerns the appeal by Mr. Richard F. Briggs of the settlement of our Claims Group which disallowed his claim for overtime compensation for standby duty for the period from August 1963 to 1976 and for call-back overtime duty for the period from August 1963 to December 3, 1976.^{1/} Mr. Briggs' claim is based on his

^{1/} By Settlement Certificate Z-2847675, February 27, 1984, the Claims Group denied Mr. Briggs' claim for overtime compensation.

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contention that he was in a compensable standby status while he was on the "call-back standby roster" outside of his regularly scheduled duty hours. In addition, Mr. Briggs has claimed overtime compensation for the occasions on which he was called back to his work place for overtime duty and received compensatory time off instead of premium pay for the work performed. As set forth below we uphold our Claims Group's disallowance of Mr. Briggs' claim.

Statute of Limitations

Mr. Briggs' claim was received by our Claims Group on February 4, 1981. In its settlement certificate dated February 27, 1984, the Claims Group disallowed his claim for the period prior to February 4, 1975, on the basis that such claim was barred by the 6-year statute of limitations set forth at 31 U.S.C. § 3702(b). That section provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in our Office within 6 years after the date it first accrued or be forever barred. We have held that the date of accrual of a claim for compensation for the purpose of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950).

Mr. Briggs has advised the agency that he delayed filing his claim for overtime compensation since one of his supervisors had allegedly advised him that the filing of a claim could result in the abolishment of his position. However, his reason for delay in filing his claim would not affect the barring of his claim. It is well established that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b). See Carlton L. Shepard, Jr., B-204542, November 30, 1981, and Freddie C. Baker, B-190841, February 15, 1978. Thus Mr. Briggs' claim for overtime compensation for standby duty and for call-back overtime work for the period prior to February 4, 1975, is barred from consideration.

Standby Duty

In August 1963 Mr. Briggs was hired as a General Investigator, grade GS-9, at Griffith Air Force Base, Rome, New York. In about September 1972, his appointment was

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changed to Criminal Investigator, grade GS-9, and he occupied a grade GS-9 position during the entire period of his claim.

Mr. Briggs states that from his appointment in August 1963 to sometime in 1976, he, together with other investigators, was listed on a standby duty roster for call-back work at his duty station. He has provided statements from several individuals who were associated with base security operations who state that for the period from 1963 to 1976 Mr. Briggs was placed on a standby roster and was subject to recall to duty outside of his regular duty hours and that he was often called back for duty. In addition, Mr. Briggs has provided copies of monthly memoranda which he prepared during the period from September 1966 to November 1972 concerning the "Security Police Investigator Standby Roster." These memoranda provided that the investigators listed would perform "standby duty" on designated dates and that the investigator on standby duty would be responsible for informing the desk sergeant of his location and how he could be contacted during the standby tour.

Mr. Briggs also has provided copies of position descriptions for the investigator positions, General Investigator and then Criminal Investigator, which he held during the period of his claim. The position description for General Investigator, grade GS-9, provided that the employee's duties would include the performance of standby duties on a scheduled basis. The position description further provided that the employee would be subject to call during standby status and was to inform the desk sergeant of his whereabouts. The position description for Criminal Investigator, grade GS-9, does not contain a specific reference to the employee's performance of standby duties but does provide that the employee's duties would include "on-call details." We note that the position description for the Criminal Investigator, grade GS-9, provides that such position is an exempt position under the the Fair Labor Standards Act. Mr. Briggs has apparently objected to the agency's determination that he is an exempt employee under the Act. The Office of Personnel Management and not this Office has the final authority to determine an employee's exemption status. See B-51325, October 7, 1976. Accordingly, the Office of Personnel Management and not this Office would be the appropriate authority to review Mr. Briggs' status under the Fair Labor Standards Act.

The record before us clearly shows that Mr. Briggs served on standby status during the period in question and that he was periodically called back to his duty station to perform work. Both the agency and our Claims Group denied Mr. Briggs' claim for overtime compensation for standby duty on the basis that such duty did not meet the applicable legal criteria for compensable standby duty.

Authority to reimburse a General Schedule employee for standby duty is contained in 5 U.S.C. § 5545(c)(1) and authority to pay for overtime work performed is contained in 5 U.S.C. § 5542.

Section 5545(c)(1) authorizes the head of an agency to pay premium pay on an annual basis to an employee in a position "requiring him regularly to remain at, or within the confines of his duty station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work."

The implementing regulation, at 5 C.F.R. § 550.143(b)(3), specifies that "at, or within the confines of his station" includes:

"(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

In Allen v. United States, 1 Cl. Ct. 649 (1983) affirmed, 723 F.2d 69 (CA FC 1983) the U.S. Claims Court cited with approval the Office of Personnel Management's regulation at 5 C.F.R. § 551.431, cited above. The court

held that time spent on an on-call status is not considered work when an employee is allowed to leave a telephone number or to carry a beeper for the purpose of being contacted, even though the employee may be required to remain within a reasonable call-back radius. The court stated that the regulation at 5 C.F.R. § 551.431 "is an accurate reflection of the concepts of standby duty and on-call status as developed in judicial decisions." Allen, supra, at 651-652.

There is nothing in the record which indicates that the agency had designated Mr. Briggs' home as his duty station. Furthermore, there is no evidence which would show that Mr. Briggs was restricted to his residence while on standby duty. The record shows that the investigators on standby duty were free to leave their residences if they advised the desk sergeant of their whereabouts and how they could be contacted in the event they were needed at the workplace. Thus, the situation here falls under the general rule that where an employee is not restricted to his residence and his residence is not designated as his duty station, he is not entitled to premium pay by virtue of being on standby duty. John T. Teske, B-190369, February 23, 1978, and Glen W. Sellers, B-182207, January 16, 1975.

Neither do we think that the restrictions placed on Mr. Briggs while on standby duty during the period in question qualifies him for overtime compensation under 5 U.S.C. § 5542 which provides in pertinent part as follows:

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter at the following rates* * *"

In order to qualify for overtime compensation under this provision, the claimant must establish that the "on-call" time at home constituted "hours of work" within the meaning of those words as used in the law. In Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), and in Moss v. United States, 173 Ct. Cl. 1169 (1965), the U.S.

Court of Claims, in defining "hours of work," concluded that where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such capacity does not amount to "hours of work" under the above-cited statute and is not compensable. The Rapp case involved an employee who was required once or twice a month to remain at home from the end of work in the afternoon until the following morning to answer the telephone for any emergency calls received during that time. He was free to leave his residence whenever necessary, provided he notified his supervisor so that calls could be diverted in his absence. The Court of Claims held that the employee was not entitled to overtime compensation under those circumstances inasmuch as the time so spent was not predominately for his employer's benefit. Also, see Allen v. United States, 1 Ct. Cl. 649, 651-652, supra.

Accordingly, Mr. Briggs is not entitled to overtime compensation under 5 U.S.C. § 5542 for the time he was on standby or on-call. The Claims Group's disallowance of Mr. Briggs' claim for overtime compensation for standby duty is sustained.

Claim for Overtime Compensation for Call-Back Work

In addition to his claim for overtime compensation for standby duty, Mr. Briggs claims overtime compensation during the period from August 1963 to December 3, 1965, for those occasions on which he states he was called back to work outside of his regular tour of duty. He has also made general allegations regarding enforced compensatory time in lieu of overtime compensation for call-back work which he performed after 1976.

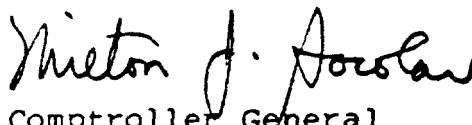
Mr. Briggs' claim for overtime compensation for the period during 1963 to 1965 is barred by the 6-year period of limitations set forth at 31 U.S.C. § 3702(b). Concerning his claim for overtime compensation for call-back overtime work, Mr. Briggs states that he was required to accept compensatory time off for such work whereas other employees were paid overtime compensation.

Agencies may grant compensatory time off instead of paying overtime compensation for irregular or occasional

overtime work. Employees whose rate of basic pay is equal to or less than grade GS-10, step 10, may request compensatory time off in lieu of overtime compensation, while employees whose rate of basic pay exceeds grade GS-10, step 10, may be required at the discretion of their agency to take compensatory time off in lieu of overtime compensation. Thus, an agency may not provide compensatory time off in lieu of premium pay for irregular or occasional overtime for employees whose rate of pay is not in excess of the maximum rate in grade GS-10, unless they request it. See 5 U.S.C. § 5543(a); 5 C.F.R. § 550.115. A general understanding or acquiescence by an individual that he will accept compensatory time off is not considered a "request of an employee" for such leave under 5 U.S.C. § 5543. Where an employee whose rate of pay is not in excess of grade GS-10, step 10, receives compensatory time off in lieu of overtime compensation and such manner of payment is not at his request, the employee is entitled to the difference between the amount of overtime compensation he should have received and the value of the compensatory time off covering such time. See Nathaniel R. Ragsdale, B-181237, April 15, 1975.

Since Mr. Briggs has been a grade GS-9 employee during the entire period of his claim he could not be required to accept compensatory time off in lieu of overtime compensation for overtime work performed. However, there is no basis upon which we may allow Mr. Briggs' claim for overtime compensation since he has not provided any evidence which would indicate the amount of overtime he worked for the period beginning in 1976. Time and Attendance Reports, personal daily diaries, and certificates of former and current supervisors showing the dates on which overtime was performed, and the amount of overtime worked by the claimant or by another employee who may have been regularly called back together with Mr. Briggs are examples of supporting evidence which might be sufficient. See George E. Gilmore, B-188238, *supra*. The present record however, will not support a finding that additional pay is due Mr. Briggs.

In accordance with the above, we sustain the Claims Group's disallowance of Mr. Briggs' claim for overtime compensation for standby duty and call-back overtime worked.

for 
Comptroller General
of the United States